HELP EPA RESTORE PROTECTIONS UNDER THE CLEAN WATER ACT

Rivers Alliance of Connecticut is joining Clean Water Action and others in calling upon all environmental and health organizations to support a highly important rule put forward by the EPA to restore and maintain traditional water protections under the Clean Water Act. These protections have been undermined by policy changes and several court rulings, most notably the US Supreme Court ruling in the *Rapanos* case. For more information on *Rapanos* go to our website's Legal Watch page and read "Wetlands in the Balance" and "The Clean Water Act Post-*Rapanos*" *[both items are reproduced below, dfr]*

Please add your organization's name and contact information to the letter below and return to us. This letter has been written by Clean Water Action and signed by Rivers Alliance and other important organizations. Tomorrow we will send out a similar letter for all of you who hold an official position in local or state government. So if you cannot speak for an organization, later you can sign individually as an official (for example, Conservation Commissioner or member of a state task force). Of course, you can always write your own, personalized letter to the EPA. (We would much appreciate a copy.) We will be sure all signatures appear on the letters that will be delivered to Clean Water Action and to the EPA. Your efforts will be welcome, we are sure, to EPA Administrator Gina McCarthy, who knows many of you personally.

October 1, 2014

The Honorable Gina McCarthy
Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works /

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

Email to: ow-docket@epa.gov

Re: Clean Water Rule Docket ID # EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The undersigned organizations, representing of members in Connecticut, appreciate the opportunity to comment on the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed *Definition of "Waters of the United States Under the Clean Water Act"* to clarify which streams, wetlands and other waters are protected under the Clean Water Act. This rule is long overdue. Many of our organizations have spent more than a decade advocating to restore Clean Water Act protections to all wetlands and tributary streams, as Congress originally intended when it passed the landmark Act in 1972.

For its first thirty years, the Clean Water Act safeguarded nearly all of our rivers, streams, lakes and wetlands, in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Despite the law's dramatic progress at combating water pollution nationally, federal policy changes in the last decade have left many small streams and "isolated" wetlands vulnerable to pollution or destruction. These federal policy changes have called into question Clean Water Act protections for nearly 60% of our nation's stream miles and at least 20 million acres of wetlands in the continental United States.

For the last decade, polluter-backed loopholes in the Clean Water Act have caused confusion about which streams, wetlands and other water are protected from pollution and destruction. Headwater and seasonal streams feed the drinking water sources of 117 million Americans, including 2.2 million residents in Connecticut. Clarifying that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act will restore protections to 844 miles of streams that 63% of our residents depend on for drinking water. This number includes 100% of those who depend on public water supplies.

Whether or not a stream or wetland is a "water of the U.S" determines whether or not a polluter must get a permit to limit the amount of pollution that can be dumped into that water. In 2007, EPA estimated that 9% of individual NPDES discharge permits in Connecticut are for discharges into headwater streams, including some streams that do not flow year round. Clarifying that these streams fall under the Clean Water Act will ensure they are protected from pollution or destruction, and therefore better protect the quality and health of downstream tributaries and rivers.

Our organizations support the proposed rule for the clear protections it restores to headwaters, intermittent and ephemeral streams, and to wetlands and other waters located near or within the floodplain of these tributaries. We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other

waters located beyond floodplains are also categorically protected under the Clean Water Act. Millions of small streams and wetlands provide most of the flow to our most treasured rivers, including the Farmington, Thames, Connecticut, and Housatonic Rivers. If we do not protect these streams and wetlands, we cannot protect and restore the lakes, rivers and bays on which communities and local economies depend. Leaving critical water resources vulnerable jeopardizes jobs and revenue for businesses that depend on clean water, including outdoor activities like angling and water-based recreation.

Our organizations support the Agencies' proposal to define all tributaries as "waters of the United States," including headwaters and small streams that may only flow seasonally. Headwater streams – streams that have no other streams flowing into them - account for 52% of the total stream miles in Connecticut. Intermittent and ephemeral streams may only flow during parts of the year, but they support water quality in downstream waters by filtering pollutants and capturing nutrients and make up 8% of Connecticut's stream miles. These streams are also critical habitat for fish and other aquatic species.

In addition, we support the Agencies' definition of tributary and strongly agree that ditches should be defined as "waters of the U.S." where they function as tributaries. There is sufficient scientific evidence that some ditches function as tributaries moving water and pollutants downstream. In those cases protection is important.

Our organizations support the Agencies' determination that all adjacent wetlands are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost.

In order to protect wetlands and other resources, we also urge the agency to:
Categorically define certain non-adjacent "other waters" as "Waters of the United States" and identify additional subcategories of waters that are jurisdictional, rather than requiring case-by-case determinations. Wetlands and other waters, even so-called isolated ones that are not adjacent to tributaries, provide many of the same natural benefits as adjacent waters located within floodplains. In fact, it is because of their placement outside of floodplains that they function as "sinks" to capture and filter pollutants and store floodwaters, protecting the physical, biological and chemical integrity of downstream waters. Examples of "other waters" where the science supports our recommendation that they should be categorically protected by rule include: prairie potholes, Carolina and Delmarva Bays, Texas coastal prairie wetlands and vernal pools such as those found all over Connecticut

Provide for new science by not categorically excluding any of the "other waters," and establishing a process by which evolving science can inform jurisdictional decisions in the future. "Other waters" that cannot be defined as jurisdictional in the final rule should still be assessed on a case-by-case basis and provisions made for categorically including them as "Waters of the United States" if and when evolving science indicates that this is appropriate.

The Agencies' commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay, and better protect the critical water resources on which our communities depend.

Our organizations urge the Agencies to swiftly finalize a rule to clarify that all waters with a "significant nexus" to downstream waters are clearly protected under the Clean Water Act. We thank the Agencies for their efforts to protect these waters and look forward to working with them to finalize and implement a strong *"Definition of Waters of the United States under the Clean Water Act."*

Sincerely,

Undersigned Organizations

Clean Water Action, Anne Hulick, Director
Rivers Alliance of Connecticut, Margaret Miner, Executive Director
Connecticut Coalition for Environmental Justice, Sharon Lewis, Executive Director
Interreligious Eco Justice Network, Teresa Eickel, Executive Director
ConnectiCOSH, Mike Fitts, Executive Director
Connecticut Public Health Association, Kathi Traugh, President

CC: US Senators and Representatives

Excerpts from Rivers Alliance of Connecticut Website:

http://www.riversalliance.org/legal_watch.cfm#wetbal

Wetlands in the Balance

In two consolidated cases involving wetlands, the Court was far more divided and the outcome was ominous for protection of streams and wetlands. The cases, Rapanos v. U.S. and Carabell v. U.S. Army Corps of Engineers, involved the scope of federal authority to regulate private land use pursuant to the CWA. At issue in both Rapanos and Carabell was whether privately owned wetlands not adjacent to navigable-in-fact waters are covered by the CWA. Since the enactment of CWA in 1972, it has been interpreted to cover almost all wetlands and streams, although the Act in fact refers to navigable waters (the traditional public trust resource). The reasoning has been that wetlands, ground water and small streams all are essential to the prudent maintenance of navigable waters. These cases challenged that reasoning.This issue sharply divided the Court. Indeed, although five Justices agreed that the case should be remanded to the lower court for further consideration, a majority of the Court could not agree on a rationale for the lower court to apply.Referring to the Army Corps of Engineers as an "enlightened despot," Justice Antonin Scalia set a stern tone for the plurality opinion he authored, joined by Justices Samuel Alito, Clarence Thomas, and Chief Justice John Roberts. Scalia's pivotal argument suggested the CWA protects fewer waters than previously articulated by the Court. Particularly, Scalia interpreted the phrase "the waters of the United States" to "include only relatively permanent, standing or flowing bodies of water." And, referring to wetlands, Scalia suggested that the CWA only covers "those wetlands with a continuous surface connection to" the aforementioned "waters of the United States." In contrast, the dissent, in an opinion authored by Justice John Paul Stevens and joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, found the Army Corps interpretation of the CWA permissible. Due to the split in the Court, Justice Anthony Kennedy's concurring opinion - which takes an analytic middle road - will be the most influential on the lower courts. Kennedy proposed that lower courts apply a "significant nexus" test to waters or wetlands not adjacent to navigable-in-fact waters. According to Kennedy's reading of the CWA, only those waters or wetlands that "posses a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made" are covered. Wetlands have the requisite significant nexus when "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of

other covered waters." Kennedy believes that because the current Army Corps of Engineer regulations are too broad, the Corps must demonstrate a significant nexus on a case-by-case basis. The final outcome can be considered a win for wetlands for the time being. Kennedy suggested that the wetlands at issue in both Rapanos and Carabell likely had the requisite significant nexus, but the facts necessary to establish that nexus needed to be presented to the lower court on remand. Meanwhile, at the federal level, environmental advocates are lobbying for the Clean Water Authority Restoration Act, which would amend CWA to clarify that it covers all public trust waters. (Many Rivers Alliance members and friends have responded to our appeals to contact members of Congress to urge support of this bill.) At the state level, our laws in Connecticut are quite strong. Nevertheless , the state laws are somewhat weakened in effect by the difficulty of enforcement at the local level, and now this challenge to the underlying federal law.

http://www.riversalliance.org/legal_watch.cfm#postrap

The Clean Water Act Post Rapanos

In our last newsletter, we reported on the U.S. Supreme Court's somewhat puzzling ruling in the Clean Water Act case Rapanos v. U.S.. The Court split 4-4 on the question of whether waters not in fact navigable are covered by the Clean Water Act. In the circumstances, a separate concurring opinion by Justice Anthony Kennedy offered hope for the large expanses of wetlands and streams traditionally protected under the Act. Justice Kennedy ruled that federal protections apply where one can show a "significant nexus" with navigable waters.

Connecticut river advocates were dismayed by a U.S. District Court's ruling in January that the Metacon Gun Club in Simsbury was not liable under the Clean Water Act for lead shot deposited in a floodplain zone, vernal pool and wetlands, which plaintiffs claimed flowed directly into the Farmington River. The relative good news is that the plaintiffs did not attempt to use Justice Kennedy's "nexus" criterion, but evidently assumed that the Supreme Court plurality decision (anti-wetlands) governed. Possibly Simsbury-Avon Preservation Society et al v. Metacon Gun Club will be appealed or otherwise clarified. The U.S. Court of Appeals for the First Circuit in U.S. v. Johnson came to much happier conclusion in October that one can apply either the Supreme Court's restrictive criteria or Justice Kennedy's more expansive 'significant nexus' test.